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CITATION

Case:

Ralph Sollitt & Sons Construction Co. v. *United States*, 80 C. Cls. 798 ..... 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 365

T. A. LOVING & COMPANY AND SOUTHEASTERN CONSTRUCTION COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-25a) is reported at 132 F. Supp. 250.

JURISDICTION

The judgment of the Court of Claims dismissing the petition was entered on June 7, 1955. The petition for a writ of certiorari was filed on August 31, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioners were properly required to use facing tile in the construction of a Veterans Administration hospital when "structural unglazed units" were specified on the finish schedule.

STATEMENT

Petitioners were the contractors (in a joint venture) for the construction of a Veterans Administration hospital in Beckley, West Virginia. The contract was entered into on February 19, 1948 at a price of $4,975,123. (Pet. App. 14a.)

The plans for the boiler house and garage of the proposed hospital required "finish 51" and the finish schedule specifies that the walls for finish 51 are to be "Struc. Unglazed Units." (Pet. App. 24a). While petitioners contend that these specifications would have been satisfied by the use of cinder block, they were required by the Government to use facing tile for the boiler house and garage walls. (Pet. App. 2a, 22a). In this action, they seek to recover the additional cost of installing the facing tile, in the amount of $19,284.29. $14,752.92 of the claim represents costs of the subcontractor, Southern Fireproofing Company, who was employed to construct these interior walls (Pet. App. 22a-23a).

Brown, the Government's liaison engineer on the project, testified that disagreement with petitioners concerning the meaning of "structural unglazed units" first occurred when he observed the installation of cinder blocks in the basement rooms in the

hospital for which this finish was specified. Petitioners were permitted to cover the exposed cinder blocks with matt glazed tile one inch thick, to give the same appearance as a facing unit, and did so without protest or claim for additional costs.[1] Brown then instructed the resident engineer to make certain that facing tile was installed wherever "structural unglazed units" were specified. (Pet. App. 21a-22a; Tr. 130-1, 140-3, 145-6.) The subsequent installation in the garage and boiler house led to the instant claim, which was denied by the contracting officer and the Army Board of Contract Appeals for the Corps of Engineers, acting for the Secretary of the Army (Pet. App. 23a).

Sections 4 and 5 of the specifications, set forth at Pet. App. 15a-20a, are the pertinent provisions of the specifications. Section 4 is entitled "Masonry: Brick and Structural Tile," and Section 5 deals with "Masonry: Structural Facing Units." Under the latter subject, Section 5.04 generally distinguishes between "glazed and unglazed units" of "structural facing tile" and then provides: "Structural glazed units marked in Finish Sched-

[1] While petitioners contend that this acquiescence was part of an "overall settlement" (Pet. 20; Tr. 186), Brown clarified this on redirect examination and disclosed that the settlement involved only the erroneous installation of cinder block and an additional minor adjustment (Tr. 188-90). Petitioners' prosecution of this action, despite its failure to contest Brown's previous decision, is perhaps explained by the fact that the work involved in the instant case was done by a subcontractor, who is the principal claimant here, and whose principal was the chief witness for petitioners.

ule on drawings shall be ceramic opaque glaze units. Structural unglazed units marked in Finish Schedule on drawings shall be smooth unglazed units." (Pet. App. 17a.) Section 5.05 sets forth the detailed requirements for these two types of "structural facing units": "ceramic-opaque-glazed fire-clay units" (5.05 (b)(1)) and "smooth unglazed units" (505(b)(2)) (Pet. App. 18a-19a). Addendum No. 1 amended Section 4 to permit the use of cinder block instead of the structural clay tile there described (Pet. App. 20a-21a). Section 5 was not so amended. It is clear that cinder block is a reasonable equivalent for nonfacing tile, but not for facing tile which must meet specifications for appearance (Pet. App. 12a; Tr. 19, 57, 214, 216).

Plaintiff's position at the hearing was that the words "structural unglazed units" in finish 51 plainly referred to non-facing units, since the word "facing" was absent, and that consequently reference solely to Section 4 of the specifications was demanded and cinder blocks could be used (Tr. 8, 50-2, 66). In their subsequent argument to the Court of Claims, and in the petition to this Court, plaintiffs have urged, in addition, that Section 5.04 of the specifications—containing the term "structural unglazed units"—refers to nonfacing units (Pet. 18, 21-24).

The court below held that the use of "structural unglazed units" in Section 5.04 of the specifications clearly relates to facing units and that, furthermore, the term "structural unglazed units" is used in the trade to designate facing units and is not

understood to apply to a product such as cinder block (Pet. App. 11a-12a, 24a-25a). The court believed that that "scrutiny of the contract and specifications makes the question of interpretation relatively simple" (Pet. App. 11a) and dismissed plaintiffs' petition.

ARGUMENT

The Court of Claims reached its conclusion that "structural unglazed units" means facing tile on the basis of its examination of the specifications and its evaluation of the conflicting testimony before it. The court also chose to believe the testimony of the Government witnesses. No ground for certiorari has been shown. The issue is primarily one of fact and no question of general importance is raised. However, in view of the detailed discussion in the petition we discuss the merits at some length.

1. In their petition to this Court, plaintiffs assert that it is "indisputable" that facing tile must be described by use of the word "facing" (Pet. 15). However, the Government's three witnesses testified unequivocally that in the trade "structural unglazed unit" customarily means facing tile (Tr. 152-3, 174, 206, 213-4). Mr. Allen, Chief Engineer of the Structural Clay Products Institute, made this point succintly (Tr. 213):

> Q. Mr. Allen, will you tell us what the phrase "structural unglazed unit" means in the clay products industry?
>
> A. By common usage the term "structural unglazed unit" would ordinarily mean a unit

that is considered to be a facing unit, for the reason that the term "unglazed" is not ordinarily used in describing a structural tile not intended for facing purposes.

Q. Well, what phrase would be used if a structural tile not intended for facing purposes was to be indicated?

A. A structural clay load-bearing or nonload-bearing tile.

In his testimony, Mr. Allen later reiterated that, ". . . as I mentioned, the term 'unglazed' is usually applied only to facing units to distinguish them from glazed facing units" (Tr. 214). And on redirect examination, he further explained that, since a structural facing unit may be either glazed or unglazed, the term "structural unglazed unit" is used as a more specific definition than "structural facing unit" (Tr. 217-8). When asked to identify the "structural unglazed units" among the exhibits, Allen pointed out the facing tile (Tr. 214).

It is apparent from the court's finding as to the meaning of the terms in the trade (Pet. App. 24a-25a) that strong reliance was placed on Allen's testimony. The court properly believed this disinterested and reputable expert, whose testimony was concurred in by the other Government witnesses. It should be noted, moreover, that while petitioners' witnesses stated that "facing" is the necessary distinguishing word (Tr. 24, 60) and that nonfacing structural units also come both glazed or unglazed (Tr. 20, 58), they conceded that nonfac-

ing units are ordinarily unglazed and that consequently, in describing such units, the word "unglazed" is omitted; these units are called merely "structural units" unless a glaze is desired (Tr. 20, 58). This testimony is consistent with the Government's evidence and with the conclusion of the Court of Claims that the use of "unglazed" indicates that facing tile was required. The term "facing" is a part of the technically appropriate name of this tile (Tr. 218) but to persons in the trade "structural unglazed unit" is adequate and recognizable (Tr. 152-3, 174, 206, 213-4, 216, 218, 219).

2. In the instant case, the court's correct interpretation of "structural unglazed units" was inescapable, in view of the specifications which elaborate upon the terms of the finish sechedue. Sections 4 and 5 set forth the requirements for masonry generally and, patently, Section 4 deals with nonfacing structural units ("Masonry: Brick and Structural Tile") while Section 5 covers facing tile ("Masonry: Structural Facing Units").

Consistent with the testimony of the Government witnesses, it is only in the description of facing tile, in Section 5, that a distinction is made between glazed and unglazed units; and, furthermore, facing tile is described at some points in the specifications without the use of the word "facing". Thus, Section 5.04 states that "Structural facing tile shall be * * * glazed and unglazed units as hereinafter specified," and defines the kinds of glazed and unglazed facing to be used on this job:

"Structural glazed units marked in Finish Schedule on drawings shall be ceramic opaque glaze units. Structural unglazed units marked in Finish Schedule on drawings shall be smooth unglazed units." "Ceramic-Opaque-Glazed Fire-Clay Units" and "Smooth Unglazed Units" are the subjects of detailed description in Section 5.05. From these provisions, it is apparent that "structural unglazed units" was used to mean facing tile.

At the hearing, petitioners recognized the dichotomy between Sections 4 and 5 and sought to persuade the Commissioner that only Section 4's nonfacing units were indicated by "structural unglazed units" and that reference to Section 5 was unwarranted (Tr. 8, 50-52, 66). However, this theory was belied by the express use in Section 5.04 of the term "structural unglazed units." And petitioners' contention thereafter that Section 5.04 relates to nonfacing units is likewise untenable (Pet. 18, 21-24). Section 5.04's "structural unglazed units" are clearly a type of facing tile. This is evident from the heading of the entire Section 5, the context of Section 5.04, and the later description of "smooth unglazed units" in Section 5.05(b)(2) which is conceded to mean facing tile (Pet. App. 21-24); Section 5.04 explicitly noted that the finish schedule's "structural unglazed units" were to be such "smooth unglazed units."[2]

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[2] The decision in *Ralph Sollitt & Sons Construction Co.* v. *United States*, 80 C. Cls. 798, relied upon by petitioners

Petitioners' supporting evidence that 5.04 refers to nonfacing units is illusory. First, the Federal Specification SS-T-341a, incorporated by Section 5.03, does not involve nonfacing units, as urged by petitioners (Pet. 21). It describes load-bearing standards and applies equally to facing or nonfacing units (Tr. 42-44, 63-65). Secondly, while petitioners say that facing tile is always smooth (Pet. 23), the record shows that it may be either smooth or rough (Tr. 23-24). Consequently, the distinguishing term "smooth", as well as "unglazed", was a necessary part of the specification for the facing tile. Section 5.04 clearly referred to facing tile, and by thus defining "structural unglazed units" as used in the finish schedule, reinforces the recognized meaning of that phrase in the trade to substantiate the decision below.

(Pet. p. 17), held that the contractor there could use unglazed rather than glazed tile because an addendum to the specifications permitted "vitrified fire-clay tiles" to be substituted for "glazed vitrified fire-clay tiles." No analogous problem of interpretation is involved here. Moreover, both kinds of tiles involved in Sollitt were evidently facing units (80 C. Cls. at 800, 806). Since the court there underlined the distinction between glazed and unglazed facing (stressed by the Government witnesses in the instant case) and discussed facing tile without the use of word "facing," that decision supports the Government's position here.

CONCLUSION

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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